No. 3962

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. B. C. LOCKWOOD,

Appellant,

vs.

THE CITY OF PORTLAND, a Municipal Corporation, GEORGE L. BAKER, Mayor thereof, and A. L. BARBUR, JOHN M. MANN, C. A. BIGELOW, and S. C. PIER, Commissioners, and GEORGE R. FUNK, Auditor thereof, also SCHOOL DISTRICT NO. 1, MULTNOMAH COUNTY, OREGON, including the CITY OF PORTLAND, a body politic and corporate, W. L. WOODWARD, GEORGE P. EISEMAN, FRANK L. SHULL, W. J. H. CLARK, J. E. MARTIN, GEORGE B. THOMAS and F. C. PICKERING, Directors of said SCHOOL DISTRICT NO. 1, and OREGON REAL ESTATE COMPANY, a Corporation,

Appellees.

BRIEF OF RESPONDENT, THE CITY OF PORTLAND

Upon Appeal from the United States District Court for the District of Oregon.

FRANK S. GRANT,
H. M. TOMLINSON,
City Hall,
Portland, Oregon,
Attorneys for Respondent,
The City of Portland and Its Officers.

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STATEMENT OF FACTS

We wish to correct and supplement the appellant's statement of the case by referring to the following facts which appear in the record:

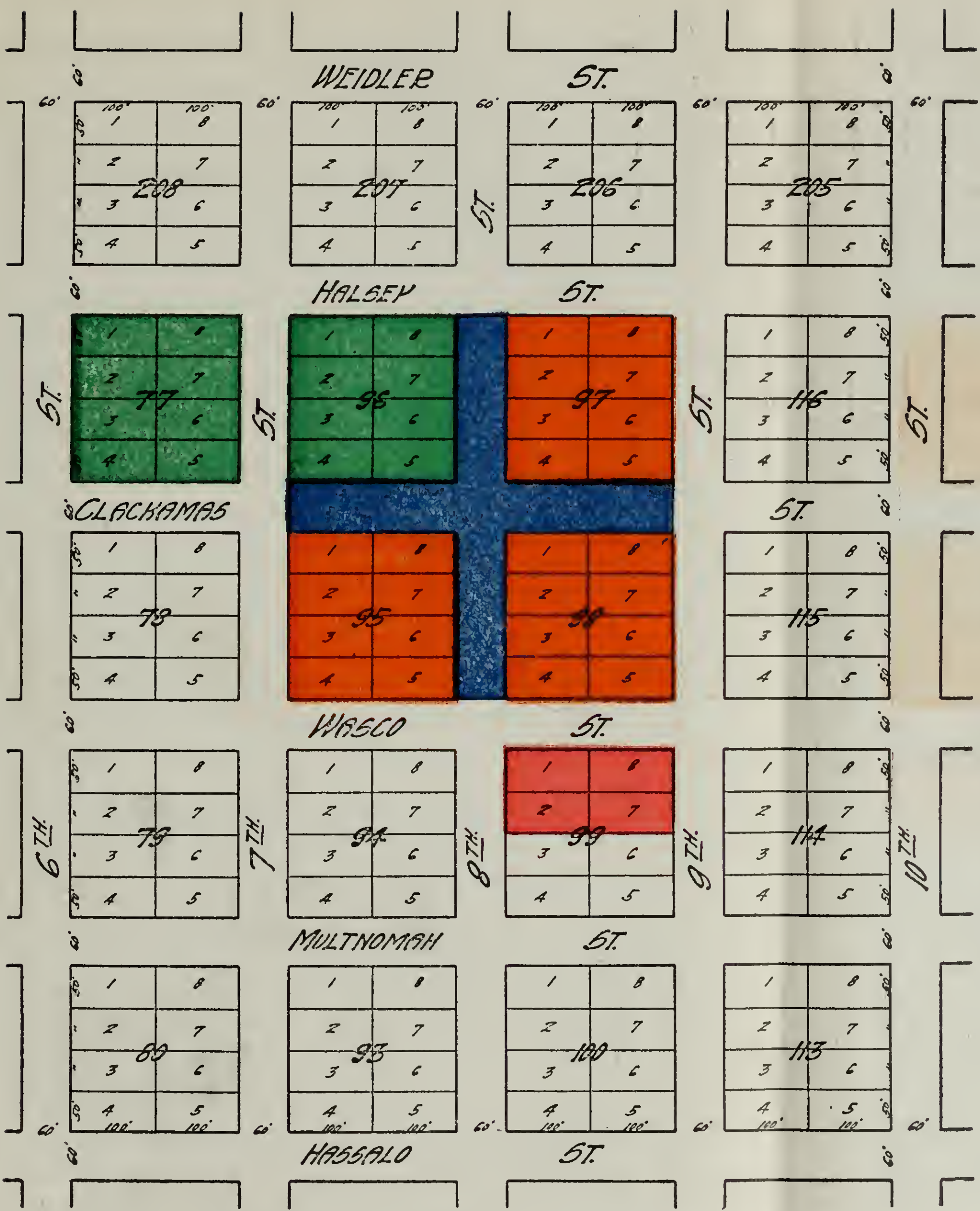
The Oregon Real Estate Company did not petition nor ask for the vacation of the street. The sole petitioner was School District No. 1 which comprises the whole of the City of Portland (Tr. pp. 45, 48.) The Oregon Real Estate Company merely signed the consent of abutting property owners which was attached to the petition in accordance with the procedure prescribed by law. (Tr. pp. 46, 49.)

None of the frontage of appellant's property has been cut off by the vacation proceedings. All of the

streets on the four sides of the block in which his property is situated still remain full width and unobstructed. His property can still be approached on full-width streets from the North, South, East, and West. He can go from his property on full-width streets to any other part of the city in as direct and short a way as he could before the vacation. All this will appear from a reference to the map on the opposite page, which is an enlargement of a section of the plat appearing in the complaint and in the abstract, with the ownerships indicated in colors. The effect of the proceedings on plaintiff is to prevent him from driving his automobile into the area marked blue on the map. In this respect he is affected in the same way as all other people in the city.

Referring to the statement on page 6 of Appellant's Brief to the effect that he spent money "in improving the streets of Holladay's Addition," there is no allegation of fact showing that he ever spent a cent to improve the portion of the streets affected by the vacation proceedings.

Contrary to the general tone and principal argument in appellant's brief, there are no facts concerning his deed nor the plat of Holladay's Addition which differentiate those documents from the ordinary deed and plat, or which give him any other or different rights in the streets of Holladay's Addition than the ordinary owner of a lot in a recorded plat. The dispute in this case is not between the appellant and the dedicator of the plat or the latter's successor; but the dispute is between the appellant on one side, and the City of Port-



—Legend—
Red- Property Owned By Plaintiff.
Green- " " " School District.
Orange- " To Be Purchased By School District.
Blue - Portions Of Streets To Be Vacated.

Sec. 2831, 2931.
King. 1-27-23. 1.00

land and School District No. 1, exercising governmental functions under authority of the state, on the other side.

There is no issue in this case on the point as to whether the streets in Holladay's Addition were really dedicated. We concede that all the streets in the plat were duly dedicated and that they were public streets and highways with all that those words connote. The majority of appellant's citations and arguments are therefore superfluous.

All that the defendant City has done in said proceedings is to relinquish its jurisdiction over the portion of the streets vacated, which, under the laws of Oregon, has now reverted to and is the property of the abutting owners. Appellant seeks, by a mandatory injunction, to compel the City to re-assume jurisdiction over the said portions of land, with the consequent burdens, liabilities and expense.

POINTS AND AUTHORITIES

Point 1.

Except as restricted by the constitution, the state's power is plenary in respect to the vacation of streets and highways within its borders, and this power may be delegated to a municipal corporation.

13 Ruling Case Law p. 67.

Dillon, Municipal Corporations (5th Ed.) sec. 1160.

McQuillin, Municipal Corporations, Sec. 1402.

Point 2.

The City of Portland has ample power to vacate streets both under the general laws of the state and under its own charter. It has had such power since the city was first incorporated in 1851, at first under the Territorial laws and later under the laws of the state.

Sec. 284, Charter, City of Portland, Compilation of 1914 that continues in effect as ordinances sections 362, 363, and 364 of the Charter of 1903. (Tr. pp. 27-32.)

Sections 3, 7, and subd. (12) of Section 34 of Charter, compilation 1914. (The foregoing appear on pages 23-32, Transcript.)

General Laws of Oregon, Session 1850, p. 262.

General Laws of Oregon, 1845-1864, Compiled by M. P. Deady, pp. 926-927.

Oregon Laws, Sec. 3824.

The Charter-ordinances above referred to (Secs. 362, 363, 364 Charter of 1903) have full statutory and charter power behind them. Blue vs. Portland, 77 Ore. 135.

Said Section 3824, O. L., reads as follows:

"VACATION OF LOT OR STREET IN INCORPORATED TOWN. In cases where any person interested in any corporated town in this state, the corporate functions of which shall be in active operation, may desire to vacate any street, alley, or common, or part thereof, it shall be lawful for such person to petition the common council or other body in like manner as persons interested in towns not incorporated are

authorized to petition the county court; and the same proceeding shall be had thereon before such common council or other corporate body having jurisdiction as authorized to be had before the county court, and such common council or other corporate body may determine on such application, under the same restrictions and limitations as are contained in the foregoing provisions of this act."

The method provided for vacation in unincorporated cities and towns referred to in Section 3824 includes the provision for consent set forth in Section 3823, which reads as follows:

"CONSENT OF ADJACENT OWNERS NECESSARY TO VACATION OF STREET. But no such vacation of a street or alley, or any part thereof, shall take place unless the consent of the person or persons owning the property immediately adjoining that part of said street or alley to be vacated be obtained thereto in writing, which consent shall be acknowledged before some officer authorized to take acknowledgment of deeds, and filed with the county clerk."

Point 3.

The law of the place where a contract is entered into at the time of making the same is as much a part of the contract as though it were expressed or referred to therein.

13 Corpus Juris 560.

Point 4.

In vacating a street the Council of the City of Portland acts judicially, and after notice and a hearing.

Merchant vs. Marshfield, 35 Ore. 55, 60-61.

Heiple vs. Clackamas County, 20 Ore. 147, 149.

Sections 362-364, Charter of 1903.

Oregon Laws, Sec. 3824.

Elliott on Roads and Streets (3rd Ed.) Sec. 1179.

Lincoln vs. Warren, 150 Mass. 309, 310.

Point 5.

The action of a municipal corporation in vacating a street is conclusive in the absence of an allegation showing fraud or gross abuse of power. Courts will not enquire into the motives, necessity, or expediency of such act. It is always presumed that the highway was vacated in the interest of the public and that its vacation was necessary for public reasons or purposes.

Enders vs. Friday, 78 Neb. 510, 513, 514; 15 Ann Cases, 685, 686.

Freeman vs. Centralia, 67 Wash. 142, 147; Ann. Cas. 1913 D, 786, 788.

13 Ruling Case Law, pp. 68, 69, 77.

Elliott on Roads and Streets (3rd Ed.) Secs. 1182, 1183.

McQuillin, Municipal Corporations, Sec. 1403.

State vs. Park Commissioners, 100 Minn. 150.

Tilly vs. Mitchell, etc. Co., 121 Wis. 1, 9-10, 12.

Heinrich vs. St. Louis, 125 Mo. 424, 427; 46 Am. St. Rep. 490, 491.

Henderson vs. Lexington, 132 Ky. 390; 22 L. R. A. (N. S.) 20.

Point 6.

A few authorities hold that the vacation of a street is not an injury to the abutting owners within the provisions of the constitution requiring compensation, and, in the absence of a statute making provision for damages, none can be recovered.

13 Ruling Case Law, p. 71.
Levee District vs. Farmer, 101 Cal. 178.
East St. Louis vs. O'Flynn, 119 Ill. 200.
Paul vs. Carver, 24 Pa. St. 207.
McGee's Appeal, 114 Pa. St. 470.
Barr vs. Oskaloosa, 45 Ia. 275.
Williams vs. Carey, 73 Ia. 194.
Hielscher vs. Minneapolis, 46 Minn. 529.
Fearing vs. Irwin, 55 N. Y. 486.
Note 26 L. R. A. 622.
Note 2 L. R. A. (N. S.) 269.
15 Ann. Cases 690.
McQuillin, Municipal Corporations, pp. 2992, 2993.
Dillon, Municipal Corporations (5th Ed.) p. 1839.

Point 7.

The general rule, however, is that persons *specially injured* by the vacation are entitled to recover such damages as they may sustain even in the absence of a statute providing therefor. *But to warrant a recovery*

it must appear that the complaining party has suffered some special damage differing in kind and not merely in degree from that sustained by the general public.

Freeman vs. Centralia, 67 Wash. 142; Ann. Cas. 1913 D, 786 with note p. 790.

13 Ruling Case Law p. 71, 73.

Cummings vs. Deere, 208 Mo. 66; 14 L. R. A. (N. S.) 822, 828.

Hyde vs. Fall River, 189 Mass. 439; 2 L. R. A. (N. S. 269 with annotated note.

Dillon, Municipal Corporations (5th Ed.) pp. 1840-1842.

McQuillin, Municipal Corporations, Sec. 1405.

Point 8.

The majority of decisions hold that owners of property that does not abut immediately upon the vacated portion of the street are not entitled to compensation, as their inconvenience or damage is not different in kind from that sustained by the general public.

Enders vs. Friday, 78 Neb. 510; 15 Ann. Cases 685, with annotated note p. 689.

Freeman vs. Centralia, 67 Wash. 142; Ann. Cas. 1913 D, with annotation p. 792.

Cummings vs. Deere, 208 Mo. 66; 14 L. R. A. (N. S.) 822, 828.

German vs. Baltimore, 123 Md. 142; 52 L. R. A. (N. S.) 889, with exhaustive annotations.

Dillon, Municipal Corporations (5th Ed.) p. 1842.

Elliott on Roads and Streets (3rd Ed.), Sec. 1181.

McQuillin, Municipal Corporations, p. 2995.

Point 9.

Other authorities hold that the property owners entitled to compensation include those, and only those, whose property abuts upon the street within the block in which the closed portion lies; that is, where the closed portion lies between the complainant's property and the next intersecting street.

Newark vs. Hatt (N. J.), 30 L. R. A. (N. S.) 637, 642.

Henderson vs. Lexington, 132 Ky. 390; 22 L. R. A. (N. S.) 20 at p. 40.

Elliott on Roads and Streets (3rd Ed.) 1181.

McQuillin, Municipal Corporations, Sec. 1410.

German vs. Baltimore, 123 Md. 142; 52 L. R. A. (N. S.) 889, with note citing numerous authorities.

Point 10.

Authorities are practically unanimous to the effect that a property owner is not *specially damaged* and cannot recover compensation unless his property either (a) abuts upon the closed portion of the street, or (b) lies between the closed portion and the next intersecting street leaving his property in a cul de sac, or (c), through some other state of facts, access to his property is cut off.

See note to Enders vs. Friday, 15 Ann. Cas. p 689.

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See note to Enders vs. Friday, 15 Ann. Cas. p 689.

Meyer vs. Richmond, 172 U. S. 82.

Freeman vs. Centralia, 67 Wash. 142; Ann. Cas. 1913 D 786, with annotation p. 792.

Newark vs. Hatt, (N. J.) 30 L. R. A. (N. S.) 637, and annotated note.

13 Ruling Case Law, p. 71, 73.

Hyde vs. Fall River, 189 Mass. 439; 2 L. R. A. (N. S.) 269 with annotated note.

Cummings vs. Deere, 208 Mo. 66; 14 L. R. A. (N. S.) 822, 828.

Dillon, Municipal Corporations (5th Ed.), p. 1842.

McQuillin on Municipal Corporations, Sections 1405 to 1411 inclusive.

Elliott on Roads and Streets (3rd Ed.) Sec. 1180-1181.

Point 11.

A vacation which leaves undisturbed the highway in front of the abutter's premises and leaves him connection therefrom with the general system of streets is not an impairment of any vested rights and furnishes no ground for an action.

Cram vs. Lacona, 71 N. H. 51; 57 L. R. A. 282.

Note to Enders vs. Friday, 15 Ann. Cas. 689.

Note to Freeman vs. Centralia, Ann. Cas. 1913 D at p. 792.

13 Ruling Case Law, p. 73.

Newark vs. Hatt, (N. J.) 30 L. R. A. (N. S.) 637, with annotated note.

Cummings vs. Deere, 208 Mo. 66; 14 L. R. A. (N. S.) 822, 828.

Elliott on Roads and Streets, (3rd Ed.) sec. 1181.

German vs. Baltimore, 123 Md. 142; 52 L. R. A. (N. S.) 889, with notes.

Point 12.

The vacation of a street for school purposes or for public or *quasi* public buildings or grounds is a public purpose.

Note to Henderson vs. Lexington, 22 L. R. A. (N. S.) 169.

Lewis, Eminent Domain, pp. 398, 399.

Meyer vs. Teutopolis, 131, Ill. 552.

Cherry vs. Rock Hill, 48 S. C. 553.

Polack vs. Orphan Asylum, 48 Cal. 490.

Reis vs. New York, 188 N. Y. 58.

Mottman vs. Olympia, 45 Wash. 361.

Point 13.

Even the fact that a street is vacated to enable a private corporation to use the land for a depot, or manufacturing plant, or other industry, does not preclude the vacation from being for a public purpose.

Freeman vs. Centralia, 67 Wash. 142; Ann. Cas. 1913 D, 786.

Henderson vs. Lexington, 132 Ky. 390; 22 L. R. A. (N. S.) 20, 36.

McQuillin Municipal Corporations, pp. 2988 to 2990.

Point 14.

The fact that upon the vacation of a street the land reverts to the abutting owner who may use it for his private purposes does not preclude the act of vacation from being for a public purpose.

Freeman vs. Centralia, 67 Wash. 142; Ann. Cas. 1913 D, 786.

Henderson vs. Lexington, 132 Ky. 390; 22 L. R. A. (N. S.) 20, 36.

McQuillin, Municipal Corporations, p. 2988.

Point 15.

The statute authorizes the Council of the City of Portland to vacate a street "if upon such hearing the council shall find that the public interest would not be prejudiced by the vacation of such street, or part thereof, and that the consent of the owners of the requisite number of front feet has been obtained." The findings of the Council on these matters is conclusive. The charter-ordinance provides that the finding of the Council as to whether the consent of the owners of the requisite number of front feet has been obtained *"shall be conclusive of the facts as found in all collateral proceedings, and shall be prima facie evidence of the facts in all direct proceedings."*

Sec. 362, Charter of 1903, quoted in transcript page 30.

Transcript 49 to 57, findings of council.

ARGUMENT

Authorities are unanimous to the effect that the state may confer upon a municipal corporation authority to vacate streets. (See Point 1 this Brief.)

In 1870 and 1871 when Holladay's Addition was platted and also in 1908 when the appellant bought his property in that addition, the City of Portland had power, under a grant from the state, to vacate streets within the city. (See Point 2.)

That law became and is a part of appellant's deed as much so as if it were expressly set forth therein. (Point 3.) Certainly there was no warranty implied in the deed to the effect that the defendant, Oregon Real Estate Co., would resist, or withhold its consent from the governmental authorities when the public good required the vacation of a portion of a street, which portion was not immediately appurtenant to appellant's property and in which appellant had no interest different in kind from that of the general public.

While a few authorities hold that the effect of the vacation of a street upon abutting property is damnum absque injuria (Point 6), the general rule is that the owner of property *specially damaged* is entitled to compensation to the extent of such special damage (Point 7). Some of the authorities hold to that effect under a statute providing for such damages. Others hold so under constitutional provisions requiring compensation. But all agree that before recovery may be had such damage must be immediate and proximate, and different in

kind and not merely in degree from that sustained by the general public.

The authorities are practically unanimous to the effect that a property owner is not *specially damaged* and is not entitled to compensation unless his property either (a) abuts upon the closed portion of the street, or (b) lies between the closed portion and the next intersecting street and is left in a *cul de sac,* or (c), through some other peculiar state of facts access to the property is cut off (Points 8, 9, 10, and 11).

We have been unable to find a single case that goes so far as to hold that, where a street is vacated by public authority, a property owner may recover, who is affected in the manner that appellant is affected in the case at bar. His frontage is not cut off nor limited, and he has direct access to his property in five ways over public highways each of which is 60 feet wide. Three different highways extend their broadsides along the whole length and width of his property. The above cited cases hold that it is not enough that the property owner is prevented from travelling the vacated portion; it is not enough that he is required to travel in a more circuitous route; it is not enough that travel is diverted from the front of his property; and that these things affect him in greater degree than the rest of the public. There must be some direct, immediate, and proximate damage to his property that is special to him.

Authorities on the foregoing question are cited under Points 8 to 11 inclusive. We will refer to only a few of them here by way of illustration. The case of Cum-

mings Realty Co. vs. Deere, 208 Mo. 66 14 L. R. A. (N. S.) 822, was a suit in equity to restrain the use for private purposes of the vacated portion of a street. The court in holding that the complaint did not state a cause of action in that it failed to allege facts showing that the plaintiff was specially injured, said, among other things, as follows:

> "Applying these rules as heretofore indicated, applicable to the subject of pleading, where an individual seeks to maintain an action concerning a public nuisance, we see no escape from the conclusion that the allegation in the petition of plaintiff in the case at bar is manifestly insufficient. The allegations in respect to the damages are embraced in these words: 'The plaintiff's property will be greatly damaged, and will also depreciate in value more especially than the general property in the city of St. Louis, being located on said Monroe street near to where the obstruction and permanent diverting is threatened to occur and be placed by the defendant.' That allegation simply amounts to a statement, not that its property will be specially damaged, but that it will be damaged more than the general property in the city of St. Louis, and that is not a sufficient allegation under the rules of law, as has been announced by the courts of this state. As was said by Judge Ellison in Thompson v. Macon: 'It may be that he suffered more than some others; but that will not alter the rule that, in order to entitle him to damages, he must have

sustained injury special to him and differing in kind from others.' "

See numerous citation of authorities in that opinion.

Enders et al vs. Friday et al, 78 Neb. 510; 15 Ann. Cas. 685, is a suit in equity to enjoin the mayor and council of a city from passing an ordinance vacating a street for the purpose of allowing a railroad company to construct a depot. The complaint alleges that valuable church, school and other buildings have been erected on the street and that such vacation will incommode and endanger pupils attending school, that it will injure, inconvenience and discommode the people of the city, that the ground is not needed for depot purposes, that a large number of property owners have remonstrated against the vacation, and that the defendant does not intend to pay any damages on account of the vacation. The court held that the complaint did not state facts sufficient to constitute a cause of action and in its decision passed upon two points, first, the conclusiveness of the action of the city council as to the expediency of the vacation, and, second, as to whether or not property owners whose property does not abut upon the vacated part of the street are entitled to any damages.

Upon the first point the court said:

"By this section the city council is invested with discretionary powers relating to the opening, improving, or vacation of streets and alleys within the city limits, and as a general rule, where the proceedings are regular and fraud is not shown, the courts

are not authorized to interfere with such discretion. This court has gone to the extent of declaring that the action of a village board, under the provisions of the section above quoted, in vacating a street where, as in the case under consideration, the ordinance declares such vacation to be expedient and for the public good, and where all the provisions of the statute are observed, has all the force and effect of a judgment, and that only such irregularities as are jurisdictional in their nature will render the proceedings void. Belevue v. Bellevue Imp. Co. 65 Neb. 52, 90 N. W. 1002. It was further held in that case that even if the vacation proceedings are had at the instance and request and primarily for the benefit of certain owners whose property would be benefited by such vacation, this would not affect the validity of the proceedings; that the motive of the board in vacating a street or alley would not ordinarily be inquired into by the courts."

On the second point the court held in accordance with the general rule that where a part of a street is vacated only those property owners whose property abuts upon the vacated part of the street and who are thus cut off from access to their property are entitled to damages on account of such vacation. On pages 514-516 of the Nebraska report, and on page 687 of Ann. Cas., the court, in a well-considered opinion upon this point, cites many authorities from various jurisdictions.

In a footnote to the case (15 Ann. Cas. 687, 689) is collated the most of the authorities bearing upon the

point that non-abutting property owners are not entitled to damages.

In Glascow v. St. Louis, 107 Mo. 198, the court said:

> "There is no doubt but a property owner has an easement in a street upon which property abuts which is special to him, and should be protected; but here the plaintiffs own no property fronting or abutting on the part of the street which was vacated. Their property is surrounded by streets not touched or affected by the vacating ordinance. They will be obliged to go a little further to reach Twelfth street, but that is an inconvenience different in degree only from that suffered by all other persons, and it furnishes no ground whatever for injunctive relief. Bailey v. Culver, 84 Mo. 531."

In the case of Freeman, et al, v. City of Centralia, et al, 67 Wash. 142; Ann. Cas. 1913-D 786, the plaintiffs were owners of property lying near but not abutting upon the part of a street proposed to be vacated who sought an injunction to restrain such vacation. The purpose of the vacation was to turn the land over to a railroad company to be used for railroad purposes.

The court passed upon two main points:

First, it held that citizens whose property does not abut on the vacated portion and whose access is not cut off, or who do not sustain special physical damages different in kind rather than in degree from that suffered by the public, are not entitled to compensation on the vacation of a street.

Second, it held that the fact that vacated streets may be put to private uses and that the vacation was instigated by private interests affected, does not warrant interference with the city council's action in vacating the street; the court not inquiring into the motive of the legislative action.

On the first of these propositions the court said:

> "It is contended that appellants have a right to the use of the streets upon which their property abuts for its entire length, and are entitled to compensation as abutting owners, if any part of the street is vacated. Authority upon the particular proposition advanced is divided; but this court has, in several cases, aligned itself with the great majority of American courts in holding that a property owner does not come within the rule of compensation unless his property abuts upon or touches that part of the street which is actually vacated, or a special or peculiar damage is made to appear; or, to state the proposition in its elementary form, unless his injury differs in kind rather than in degree from that suffered by the general public."

The court then cited and quoted from numerous decisions to the same effect in its own and many other jurisdictions.

On the second of the foregoing points, the court said:

> "It is more seriously contended that an injunction should issue because, by their demurrer, the defendants admit that they are 'conspiring and confederating' together with intent to turn over the

> streets when vacated to a private use. It is a rule, sustained by universal authority, that courts will not inquire into the motives of a legislative body having power to act upon a given subject-matter. But granting that we had the right to do so, it does not follow that, because the property is to be put to purposes most convenient to the one acquiring title thereto, an injunction will issue. In the first place, having power to vacate, if the title in the street reverts to the abutting owner (Schwede v. Hemrich Bros. Brewing Co., 29 Wash. 21, 69 Pac. 362), this court could not control or interfere with a lawful use of the property. Or, granting that the title does not revert but remains in the city, the mere fact that the result of a proper legislative act is to put the use of property in private control would not warrant interference by injunction."

The court then cited numerous authorities to the same effect.

On the point that non-abutting property owners are not entitled to damages or injunction, see the note to the foregoing case in Ann. Cas. 1913-D 790, 792.

In Hyde vs. Fall River, 189 Mass. 439; *2 L. R. A. (N. S.) 269,* it was held owners of property abutting on a highway adjacent to a railroad track are not affected in a manner different from the public by a discontinuance of the street within the railroad right of way, and the erection of a bridge to carry the street over the railroad track. They are, however, entitled to damage for *change of grade* where the *statute* provides for it.

In Newark vs. Hatt, (N. J.) 30 L. R. A. (N. S.) 637, it was held that where the statute provides for damages, a property owner is entitled thereto upon the vacation of a part of the street upon which his land abuts which vacated part lies between his land and the intersecting street that bounds the block, thus shutting off his access from one direction and putting his property in a *cul de sac*. The court said, however, that, "except for the statute, as expressed in the charter of the city, this street could have been vacated without the slightest consideration of its effect upon any land lying along it." This decision turns upon the question of fact as to whether there is an interventing cross street between his property and the part closed. See note appended to the foregoing case.

Contrary to the foregoing it has been held that "even under a *statute* authorizing a corporation to close a street, which provides that 'such company shall pay to the parties entitled to the same any and all damages that may accrue to them in consequence of the closing of any such highway, street, or alley,' it has been held that a party whose property was put in a *cul de sac* by reason of such closing of the street could not recover, since the damage was merely the same as that suffered by the general public and was therefore *damnum absque injuria.*" Quoted from note 2 L. R. A. (N. S.) 270 which cites other authorities.

Even where a statute provides for damages for interests taken or damaged, it does not authorize the payment of damages to an owner of property which does not

abut upon any part of the street affected by the closing, and which is bounded by other streets.

Re West 151st Street, 123 N. Y. Supp. 343, Cited in 30 L. R. A. (N. S.) 640.

In the Note, 2 L. R. A. (N. S.) 269, several cases are cited that hold that even where a statute provided for damages an owner left at the end of a *cul de sac* is not entitled to recover.

A property owner left in a *cul de sac* is not entitled to damages, where the portion closed was never opened, and the business portion of the city is in the opposite direction.

Ponischil vs. Hoquiam S. & D. Co., 41 Wash. 303, cited in 30 L. R. A. (N. S.) 638.

A party owning property in the next block is not entitled to damages. Reis vs. New York, 188 N. Y. 58; affirming 90 N. Y. S. 291, cited in 30 L. R. A. (N. S.) 639.

For exhaustive citation of authorities on the foregoing question see citations and references under Points 7, 8, 9, 10, and 11, in this Brief.

As to the necessity or expediency of the vacation, the action of the council is conclusive. Nor will the court enquire into the motive of the council. See authorities under Point 5.

Concerning the question of public purpose, we call the Court's attention to the fact that the statute (Tr. p. 30) does not require the vacation to be for a public purpose. It says: "If upon such hearing the council shall find that the public interest would not be preju-

diced by the vacation of such street, or part thereof, applied for, and that the consent of the owners of the requisite number of front feet has been obtained," the council may vacate the street. However, the record in this case shows that the purpose is for a public school building and grounds. (Tr. 15, 43, 44). That is a public purpose. See authorities under Point 12. If the council had in mind the fact that our city blocks are too small and the streets exist at too frequent intervals, and that the vacation of some would not only save the expense of maintenance, but would also facilitate traffic, that also is a public purpose.

Furthermore, it has been held by numerous authorities that it does not invalidate proceedings if the vacation is consummated as part of a plan to turn the property over to a private industry, or to a public or *quasi* public corporation to use for private, or *quasi* public, or public purposes. It has also been held that the proceedings are not vitiated even if an abutting owner is incidentally benefited by the vacation, if the main purpose is a public purpose. See authorities under Points 12, 13 and 14.

In Columbus vs. Union Pacific R. Co., 137 Fed. 869, 874, the court said:

> "It is urged, however, that the ordinance is void because it was not only a vacation, but a vacation and a grant, or sale. We concur in the conclusion, reached by the Circuit Court, that the provision, 'there shall be and is hereby granted,' etc., 'to the railroad company that portion of the street

vacated for depot purposes,' found in the ordinance, did not render the ordinance void."

In a much stronger case than the plaintiff's in the case at bar the Supreme Court of the U. S. in Meyer vs. Richmond, 172 U. S. 82 at 94 to 99, held that a permanent occupancy of the greater part of the street in front of his property by a railroad company was *damnum absque injuria.* The court cited numerous cases.

DISCUSSION OF PLAINTIFF'S THEORIES AND AUTHORITIES

The theories and authorities relied upon by the appellant are not applicable to the case at bar.

For instance the appellant, under Point 1 in his brief, and to a large extent under the other Points, cites numerous authorities to prove that if a lot or plat owner conveys a lot by reference to a map or plat that act dedicates as streets all of the streets marked on the map or plat, and thereafter he can not deny the dedication, nor revoke the same, nor take back to his private use any street so dedicated. There is no such issue in this case. The streets are conceded to have been lawfully dedicated and accepted from the time of the filing of the original plat, and no lot owner can appropriate them to his private use. But in this case the public authorities are acting under power granted by the state.

Aside from the superfluous citation of cases on that point, the appellant's authorities are either cases where a plat owner or his successor has endeavored to take back to his private use (without action on the part of

the public authorities) easements which he has conveyed to others, or cases where the vacation or obstruction interferes immediately and seriously with abutting owner's frontage or access to his property. They are not cases where the litigation is between the governmental body and an abutting owner whose property is in another block with an intersecting street between, and whose property is still accessible in five different ways and from four different directions, with a full width frontage on three sides of his property.

The theory that a private right of easement survives the vacation of a street extends merely to the right of access to one's property from the public highways. In other words a person who is not *specially injured* by the vacation retains no private easement in the vacated part of a street after the public authorities have surrendered the public easement therein. This theory of the survival of a private easement is merely another way of saying that one's frontage or egress cannot be cut off without compensation. It merely means that the property owner to whom the vacated area reverts cannot obstruct the right of access of another abutting property owner who is *specially damaged,* and not compensated. The mere right to travel that part of the highway is not a right that survives vacation.

This is shown by the authorities relied upon by the appellant. In Sandstorm vs. O. W. R. & N. Co., 75 Ore. 159, 163, 164, the court said:

> "For the invasion of the mere right to travel, as thus far stated, he is barred from recovery by the

> municipal legislation mention; but, as he passed along the street with other members of the general public, he had a privilege which no other person possessed, to-wit, that of entering upon his close from that street,"

and further that:

> "The great weight of authority, however, indicates that, where a street upon which the plaintiff's property abuts is so obstructed that he finds himself fronting upon a *cul-de-sac,* he is entitled to damage."

In that case the court held that the legislation of the city that authorized the railroad to obstruct the street effectually cut off plaintiff's right to travel the street but that he was entitled to damages for being left in a *cul-de-sac.*

So in the case of Van Buren vs. Trumbull, 92 Wash. 691, the aggrieved person owned property abutting upon the vacated portion of the street so that his frontage and egress were directly affected. The litigation was not between a private owner and the public corporation but between two quarreling lot owners, one of whom was trying to cut off the only means of access to the public highways which the other had. A plat had been dedicated and purchasers built homes therein. A general statute provided that any street that should remain unopened for five years would be automatically vacated. The court merely held that such vacation would not deprive an abutting owner of the right to get out of his own property onto a highway.

It may be conceded that the dedicator cannot recall any part of the plat but that is far from saying that the public authorities cannot vacate, subject to the right of abutters *specially* injured to recover damages.

In the case of Gormley vs. Clark, 134 U. S. 338, an owner of a town plat had sold numerous lots with reference thereto, and many years later fraudulently obtained from the village council (by leading them to believe he was the sole abutting owner), an ordinance vacating a part of Adams street cutting off the frontage and access to plaintiff's lots. The ordinance was written in the platter's own handwriting. Before the ordinance went into effect it was repealed by the council. It was held that the easement of the owner of lots, abutting on the portion of Adams street that was attempted to be vacated, still existed, and that Gormley, the original platter, should remove his obstructions therefrom. The injunction against the village and its authorities was dissolved, and no relief was granted against them. This decree protected only the abutting property.

In Central Trust Co. vs. Hennen, 90 Fed. 593, it appeared that petitioner's lot fronted upon a road in which she did not own the fee but had an easement by right of private contract. The county vacated the road along her entire frontage without making her a party. The railroad condemned the vacated road area without joining her as a defendant, and built an embankment in front of her premises 5 or 6 feet high, thus cutting off her frontage and her only egress and ingress. The court merely held that the lower court was in error in not

enquiring into petitioner's rights in the premises.

In Stevenson vs. Lewis, 244 Ill. 147, John Alexander Dowie had platted an addition in Zion City into lots with streets and public parks marked thereon. He sold none of the lots but executed over 1000 leases for a period of more than 1000 years, and, after many of the lessees had been in possession for many years, he executed and recorded an instrument purporting to vacate a park and many of the streets. Held this vacation was not lawful, that a man who dedicates a plat and leases lots for 1000 years with reference to the plat cannot thereafter revoke it.

In Tooze vs. Willamette V. R. Co., 77 Ore. 157, the court merely held that an abutting owner whose access to his land is cut off by an obstruction placed in a public highway by a railroad company is specially damaged.

In Bostwick vs. Hosier, 97 Ore. 125, the court found that the vacation was for the private interest of one of the defendants "and not for any public purpose."

As to the point raised by appellant to the effect that the petition for the vacation of 8th Street did not have sufficient signers under the charter, it is sufficient for us to refer to the charter provision (Tr. p. 30) and to the petition (Tr. p. 44-46) and note that the charter says that the findings of the council on the matter of the sufficiency of the frontage represented "shall be conclusive of the facts as found in all collateral proceedings, and shall be prima facie evidence of the facts in all direct proceedings."

The decision of the lower court should be sustained.

Respectfully submitted,

FRANK S. GRANT,
H. M. TOMLINSON,
City Hall, Portland, Oregon,
Attorneys for Respondent City and its officers.